IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

IN THE FEDERAL TERRITORY, MALAYSIA

CIVIL SUIT NO: WA-22NCvC-126-03/2022

BETWEEN

1. **VIRTUAL INFINITE SDN BHD**

   (Comp. No: 201201003327 (976852-W)

2. **DATO' SRI HAJI ABANG ADITAJAYA BIN HAJI ABANG ALWI**

   (I/C No: 780513-13-5497) **...PLAINTIFF-PLAINTIFF**

AND

1. **TERAS SARI RESOURCES SDN BHD**

   (Comp. No: 200601024122 (743879-W)

2. **TEE MENG LEE**

   (I/C No: 850625-05-5003)

3. **CHONG WAN SHAN**

   (I/C No: 850127-05-5385)

4. **MENTA CONSTRUCTION SDN BHD** **...DEFENDANT-**

   (Comp No: 198201003454 (83199-M) **DEFENDANT**

JUDGMENT

Enc 50: D1, D2 & D3's application for further and better particulars under Order 18 Rule 12 and/or Order 92 Rule 4 Rules of Court (RoC)

Enc 30: D4's application to strike out the suit under Order 18 Rule 19(1)9a) or (b) or (d) and/or Order 92 rule 4 (RoC)

[1] There are several applications in this suit. This Court first heard the application by the First to the Third Defendants under Order 18 Rule 12 and/or Order 92 Rule 4 Rules of Court (RoC) for further and better particulars. This Court then also heard the Fourth Defendant's application to strike out the Plaintiff's claim against it under Order 18 Rule 19(1)(a) or (b) or (d) and/or Order 92 Rule 4 RoC.

The Plaintiffs' suit

[2] The Plaintiffs' claim of RM25,639,358.09 is for consultancy fees for "Projek Menaiktaraf Jalan Dari Bandar Pekan Ke Kampung Sungai Miang, Pekan, Pahang" (the Project). According to the Statement of Claim this was premised on the appointment of the Second Plaintiff to liaise and consult with various authorities for the Project whereby the Second and Third Defendants were to utilise the First Defendant to participate in the tender for the Project.

[3] That consultancy agreement was for a sum of 30% of the value of the Project to be paid via three instalments – (i) RM27,000,000 to be paid to the Second Plaintiff via BeCup Capital Sdn Bhd, within seven days of the issuance of the Letter of Award for the Project (ii) RM32,000,000 within

thirty days of the issuance of the Letter of Award for the Project (iii) the balance sum of RM32,000,000 payable by three equal instalments commencing from thirty days of the Letter of Award.

[4] The tender was successful and the First Defendant entered into a contract with the Government of Malaysia on 30.5.2018 for a contract price of RM319,000,000. The Second Plaintiff received the first instalment payment with the balance sum remained unpaid.

[5] The Plaintiff stated that upon the change of government, the First Defendant was notified in mid 2018 that the Project was one of those that faced termination or contract price reduction. Through discussions between the Defendants (the Second and Third Defendants together with a representative from the Fourth Defendant) and the Second Plaintiff, the First Defendant then engaged the Second Plaintiff as consultant (this time through YAZ Consult Sdn Bhd) to make representations against the termination and/or contract price reduction on 13.7.2018.

[6] On 19.9.2018 the Ministry of Finance (MoF) decided to terminate the Project with the First Defendant. The Second Plaintiff then took the necessary action to liaise with the Government of Malaysia and relevant authorities to reinstate the Project and/or negotiate a minimum contract price reduction. The Second Plaintiff was successful in appealing against the termination of the Project and had achieved a contract price reduction of 8%.

[7] According to the Second Plaintiff, the Second and Third Defendants together with a representative of the Fourth Defendant had instructed the Second Plaintiff to secure changes in the types of quantities for the Project

or to further minimize the reduction of the contract price – vide letters dated 1.7.2019. One appointment letter with the First Plaintiff for a consultancy fees of RM20,000,000 for the former. The other of the same even date was for the latter with the fees stated as "*Yuran bagi perkhidmatan tuan adalah jumlah daripada penjimatan yang dipersetujui oleh pihak Kerajaan Persekutuan kelak, tertakluk kepada terma dan syarat-syarat di dalam Perjanjian Konsultan.*" The mode pf payments were the same terms as (iii) of the consultancy agreement above. The Second Plaintiff was appointed by the First Plaintiff as a person in charge to deal with and provide the said consultancy services to the First Defendant.

[8] The First Plaintiff contended that the First Defendant held its 8% shares in the proceeds of the Project for the consultancy fees of RM25,369,358.09 on a constructive trust relying on the term in the second letter of appointment dated 1.7.2019:

> "*Sukacita dimaklumkan kepada pihak syarikat kami, Teras Sari Resources Sdn Bhd bersetuju melantik syarikat tuan sebagai konsultan bagi rayuan kepada Kerajaan Persekutuan untuk mengurangkan penolakan Harga Kontrak bagi projek di atas dariapda 8% kepada 3% sahaja.*
>
> *Yuran bagi perkhidmatan tuan adalah jumlah daripada penjimatan yang dipersetujui oleh pihak Kerajaan Persekutuan kelak, tertakluk kepada terma dan syarat-syarat di dalam Perjanjian Konsultan.*"

[9] On 31.10.2019 MoF reverted that the contract price reduction was to be 6%. Upon further efforts by the Second Plaintiff's appeals, the original contract price for the Project was reinstated.

[10] On 12.3.2021 the Second Plaintiff met with the Third Defendant and discussed the consultancy fee payment. The Second Plaintiff was told to wait for the same.

[11] On 31.3.2021 the Second Plaintiff then discussed the consultancy payment with the representative of the Fourth Defendant and was informed to liaise with the Third Defendant. The representative thereafter had refused to respond to the text messages from the Second Plaintiff.

[12] The Second Plaintiff continued his inquiries, sent reminders and requests for payments but the First Defendant had failed to honour the contractual obligation. The Project was almost 89% completed as at 10.12.2021 with the balance of the proceeds of payment for the Project at RM58,000,000. The Plaintiffs feared that the payment due to them would not be honoured.

[13] The reliefs prayed for in the Statement of Claim are, amongst others:

(i) A declaration that the First Defendant was an express trustee for the First Plaintiff's 8% share of the proceeds in the sum of RM25,369,258.09;
(ii) In the alternative, a declaration that the First Defendant was a constructive trustee for the First Plaintiff's 8% share of the proceeds in the sum of RM25,369,258.09;
(iii) An order that the First Defendant pay the First Plaintiff the sum of RM25,369,258.09;
(iv) General, aggravated, exemplary damages for breach of express/constructive trust.

The application for further and better particulars by the First to the Third Defendants

[14] The First to Third Defendants' grounds for and order for further and better particulars are:

(a) The Plaintiff's Statement of Claim is confusing, insufficiently pleaded and lacking in requisite particulars;
(b) The further and better particulars sought by the First to Third Defendants are highly relevant and intrinsically linked to the salient facts and issues;
(c) No justifiable reason for the Plaintiffs not to disclose further and better particulars;
(d) The First to Third Defendants are unable to verify facts and answer to the claims;
(e) Disclosure of the better and better particulars are necessary.

[15] The particulars sought are itemised in Appendix A to the application (Enc 50). Specifically, they relate to paragraphs 22, 27(i)-(ii) and 31 of the Statement of Claim. As ruled by Gopal Sri Ram CJA (as he then was) in ***Skrine & Co v MBF Capital & Anor & Other Appeals [1998] 3 MLJ 649*** at p669:

> "*Each case is an individual case, and in each case a party is entitled to know what case he will have to meet so that he can be prepared to meet that case.*"

[16] This Court refers to the decision of the learned Ariffin Zakaria J (as he then was) in ***Dato Seri Ling Liong Sik v Khrishna Kumar s/o***

Sivasubramaniam [2002] 2 MLJ 278 that laid down the principles of particulars in pleadings at p286:

> *"the function of particulars is accordingly:-*
>
> *(1) to inform the other side of the nature of the case that they have to meet as distinguished from the mode which that case is to be proved (per Lindley LJ in Duke & Sons v Wisden Co (1897) 77 LT 67 at p68, per Buckley LL in Young (G&W) & Co Ltd v Scottish Union & National Insc Co (1907) 24 TLR 73 at p74, Aga Lhan v Times Publishing Co [1924] 1 KB 675 at p679);*
>
> *(2) to prevent the other side from being taken by surprise at the trial (per Cotton LJ in Spedding v Fitzpatrick (1888) 38 Ch D 410, Thomspn v Birkley (1882) 31 WR 230);*
>
> *(3) to enable the other side to know what evidence they ought to be prepared and to prepare for trial (per Cotton LJ ibid; per Jessel MR in Thorp v Holdsworth (1876) 3 Ch D 637 at p639; Elkington v London Association for the Protection of Trade (1911) 27 TLR 329 at p330);*
>
> *(4) to limit the generality of the pleadings (per Thesiger LJ in Saunders v Jones (1877) 7 Ch D 435) or the claim or the evidence (Milbank v Milbank (1900) 1 Ch 376 at p385);*
>
> *(5) to limit and define the issues to be tried, and as to which discovery is required (Yorkshire Provident Life Assurance Co v Gilbert and Rivington (1895) 2 QB 148; per Vaughan Williams LJ in Milbank v Milbank (1900) 1 Ch 376; 385);*

(6) to tie the hands of the party so that he cannot without leave go into any matters not included (per Brett LJ in Phillips v Phillips (1878) 4 QBD 127 p133; Woolley v Broad (1892) 2 QB 317_ - 'All material facts' para 18/7/10: and Wooley v Broad (1892) 2 QB 317). But if the opponent omits to ask for particulars, evidence may be given which supports any material allegation in the pleadings (Dean of Chester v Smelting Corp (1902) WN 5; Hewson v Cleeve (1904) 2 Ir R 536)."

Para 22 of the Statement of Claim

[17] On the outset, this Court finds that the Plaintiff's Statement of Claim is not the tidiest. There are some facts pleaded that are not facts in issue. At the end, the Plaintiffs' claim in their Statement of Claim for the purported sum of RM25,369,258.09 seemed premised on the second letter of appointment on 1.7.2019 that specifically related to the reduction in the contract price for the Project from 8%. There is the other letter of appointment pleaded and a few other agreements too.

[18] This Court thus grants the application by the First to the Third Defendants to ascertain the cause of action for the Plaintiffs' claim. As held in ***Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd [1992] 2 MLJ 615*** at p620:

"It is axiomatic that pleadings operate to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. Pleadings operate so as to prevent any trial by

ambush and, of the mixed metaphors may be pardoned, encourage litigants to put their cards on the table. See Malayan Banking Bhd v Ong Kee Chong Motors Sdn Bhd [1991] 1 CLJ 363 at pp368 and 369. What is more, there are the provisions of O18 r8(1) which read as follows:

A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality –

(a) which he alleges makes any claim or defence of the opposite party not maintainable; or

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading."

[19] Although there are lot of facts and letters of appointment issued, it is unclear as to which letters of appointment the Plaintiffs are basing their cause of action on. This Court allows with regards to para 22 of the Statement of Claim:

(i) to state without equivocation whether it is or it is not the Plaintiffs' case that their cause of action is based only on the letter of appointment dated 1.7.2019 to reduce the reduction of Contract Price from 8% to 3% ("Contract Price Issue") , and not on the Letter of Appointment dated .7.2019 for conversion of contract payment from "Provisional Quantity" to a "Lump Sum" contract ("Lump Sum Payment Issue");

(ii) to state with particulars the facts as to how the First Defendant had mutually agreed with the Second Plaintiff that the mode of payment shall be the same as that of the consultancy agreement between the First Defendant and BeCup Capital Sdn Bhd.

[20] This Court is of the view that it would help define the issues to be tried and clarify the claim so that the First to Third Defendants know exactly what they are to defend to – the Federal Court's decision in ***Pang Kim Guan v Lee Cheng Liam [1968] 2 MLJ 132***:

> *"Now what is the function of particulars? In 30 Halsbury p18 para 37 the following passage appears –*
>
> *'The function of particulars is to limit the generality of the allegations in the pleadings, and thus to define the issues which have to be tried and as to which discovery must be given. Each party is entitled to know the case that is intended to be made against him at the trial and to have such particulars of his opponent's case will prevent him from being taken by surprise; but a party is not entitled to an order for particulars for the purpose of ascertaining the evidence upon which his opponent proposes to prove his case, nor is it the function of particulars to fill gaps in a statement of claim from which a material statement has been omitted.'"*

[21] This Court also orders for the Plaintiffs to disclose the identity of the officer of the First Defendant whom the Second Plaintiff had liaised with. This Court finds what was pleaded was too general without the particulars of the facts that the Plaintiffs would be relying on to prove the claim against the First to Third Defendants. At the end of para 22.2, it was stated:

> *"It was mutually agreed between he 1st Defendant and the 2nd Plaintiff that the mode of payment of the said consultancy fee shall be in the same terms as mode of payment for the balance of the fees payable under the Consultancy Agreement which was agreed to refer to the Consultancy Agreement between the 1st Defendant and BeCup Capital Sdn Bhd pleaded in paragraph 10 above."*

[22] There is no indication as to the nature of the evidence in respect of the contention that the First Defendant and the Second Plaintiff had mutually agreed to incorporate a term agreed upon in another agreement, in another year with another party. To quote the decision in ***Coca-Cola Refreshments Malaysia Sdn Bhd v Leesing Sales & Marketing Sdn Bhd and Anor [2020] 1 LNS 2211*** para 57:

> *"In order not to be embarrassing, the Plaintiff must be informed exactly what the Defendant is asserting in respect of the alleged conduct and the course of dealing by which the 1st Defendant alleged that there were such Additional items agreed."*

[23] With the further and better particular as to the identity of the officer of the First Defendant that the Second Plaintiff was allegedly to have discussed and agreed, the First to Third Defendants would know precisely the allegations and how to defend it.

Para 27 Statement of Claim

[24] In pleading the facts that the Plaintiffs had executed the works as appointed in the letter of appointment of 1.7.2019, the facts on the works undertaken by the Second Defendant were pleaded in paras 27(i)-(iii).

This Court has considered the further and better particulars sought for by the First to the Third Defendants and decides as follows:

(i) Para 27(i) of the claim stated "*making representations on behalf of the 1st Defendant to the Minister-in-charge requesting for a change in the bills of quantities from a "Provisional Quantity" to "Lump Sum" and attending meetings with the Minister to obtain his approval and also his direction to the Ketua Pengarah Kerja Raya for the urgent processing of the change;*"

To this the First to the Third Defendants sought for the particulars of when, the numbers, and the type of the alleged 'written representations' which made by the Plaintiffs on behalf of the First Defendant to the Minister-in-charge in his capacity as the 'consultant' on behalf of the First Defendant and also all the meetings attended to by the Second Plaintiff and the precise alleged directions and manner they were given by the Minister-in-charge to the Ketua Pengarah Kerja Raya. The identities of the Minister-in-charge and the Ketua Pengarah Kerja Raya Minister of Public Works were also sought.

This Court rules that they tantamount to evidence which the Plaintiffs are under the legal obligation to adduce at trial. They are not facts necessary to be pleaded in the pleadings. The facts as to the consultant works carried out by the Second Plaintiff are clear – the written representations and attended meetings as stated in para 27(i). As to how many there were and the identities of the officers from the ministries/agencies/authorities are of no relevance to the fact in issue which is work done as agreed but not paid. Para 27(ii)-(iii) further stated that the Second Plaintiff

had obtained the letters. How and from whom would be an evidence that if not proven, the Plaintiff may fail to successfully claim against the First to Third Defendants. The pleadings in para 27(i)-(iii) are clear and the First to Third Defendants can clearly defend the claim stated. The defence is not handicapped or reliant on the identities of the personalities or the number of meetings held as the facts pleaded are clear.

The First to Third Defendants had also asked for the particulars on how the alleged 'written representations' and 'meetings' caused the reduction of the contract price from 8% to 3%. Again, this is evidence and submissions on the evidence to be adduced at trial.

Therefore, this Court will not order for the particulars sought in Appendix A in relation to para 27(i) of the Statement of Claim.

(ii) Para 27(ii)-(iii) of the claim stated "*thereafter, obtaining a letter dated 26.9.2019 from the Director-General of Public Works requesting the Setiausaha Bahagian, Bahagian Perolehan Kerajaan of MoF to either: (i) have a contract price rationalization done; or (ii) change the quantity of the Project from "Provision Quantity" to "Lump Sum"; and*

Subsequently, obtaining a letter dated 18.10.2019 from the Minister of Works to the Minister of Finance (MOF) requesting for the contract quantities for the Project to be changed from "Provisional Quantities" to" Lump Sum."

The further and better particulars sought for are with the date, the time and the place the Second Defendant had obtained the said

two letters, when both letters are government internal letters and were not addressed to either the Second Plaintiff or the First Defendant. Particulars of from whom the letters were obtained with the dates, time and place are also sought for. Again, particulars of how the issuance of the alleged letters were said to be caused by the Second Plaintiff having carried out the said consultant works.

This Court views those are evidence and that they are not required to be pleaded. The claim is clear as to the works carried out and the documentary evidence confirming the same, regardless of how they were obtained.

Para 31 of the Statement of Claim

[25] The Plaintiffs pleaded in para 31 "*Thereafter, the appeals described earlier and coordinated by the 2nd Plaintiff through the 1st Defendant's letters, PKBM's letters and appeals by the Ministers and relevant agencies, were brought up in the cabinet meetings and ultimately, the Contract Price for the Project was restored to the original Contract Price or "Harga Kontrak Asal" on 12.3.2021.*"

[26] The First to the Third Defendants had sought for a list of particulars in particular the dates, time venue of the alleged appeal and/or act of co-ordination undertaken by the Second Plaintiff and the identities of the ministries/agencies and the said ministers/officers/agents/representatives the Second Plaintiff had liaised with. Further, also applied for are particulars as to the methods used by the Second Plaintiff (whether verbal or written representation), the reasons and grounds advanced by the Second Plaintiff and the types of documents used, the particulars of

meetings attended by the Second Plaintiff (dates, time, venue) and the particulars of letters/correspondences issued by the Second Plaintiff.

[27] This also extended to the name of the Minister who recommended the Second Plaintiff's alleged representation/appeal to the Cabinet, the dates, times, venues of the alleged Cabinet meetings and decision including the attendees of the Cabinet meetings.

[28] Again, as can be seen, they are all evidences and thus are not particulars of the cause of action against the First to Third Defendants.

[29] This Court also holds the same view as to the application to state the manner in which the Cabinet's decision became known to the Second Plaintiff and the identity of the person who had conveyed the same.

[30] This Court acknowledges the decision by the Court of Appeal in ***Lembaga Pelabuhan Kelang v Mega-Wan Corporate Services Sdn Bhd [2013] 1 CLJ 605*** where it was held:

> "*We recognise that there is the temptation to use the argument that what is sought is evidence in order to avoid providing further and better particulars, in such event, the court must examine whether what is being labelled in objection as evidence is actually evidence or in fact are particulars of fact. The distinction is that evidence is what proves a fact, and particulars of facts are primary facts that are relied upon to prove, by inference or conclusion, a disputed fact. A simple example is that the various acts of dishonesty are primary facts which together may lead to the inference or conclusion of fact that a fraud had been committed.*"

[31] Hence, the said further and better particulars applied for are evidential in nature and not necessary to be pleaded. The claim on the purported work carried out by the Second Plaintiff had clearly been stipulated. It was submitted on behalf of the First to Third Defendants that it is part of their defence that the purported works are heavily disputed. This Court opines that they can proceed to state so and present such defence at trial, without the further and better particulars as to the names of the Minister, Director General of officers of the ministries/agencies/authorities. It is reminded again that the Plaintiff is obliged to prove all facts contended within its knowledge.

[32] However, this Court will allow the application for the Plaintiffs to state whether such decision was restricted only to the Project or was applicable to various government projects nationwide as the First to Third Defendants are challenging the fact that it was due to the Second Plaintiff's said work.

[33] This Court concludes that this further and better particular is necessary to be pleaded to give better clarity as to the result of the Second Plaintiff's contended efforts in claiming for the fees. The First to Third Defendants must also know with certainty what it is that they are defending to.

[34] As reiterated by the Court of Appeal in ***Quality Concrete Holdings Bhd v Classic Gypsum Manufacturing Sdn Bhd & Ors [2012] 2 MLJ 521*** at p541:

"Pleadings, as a general rule, should contain particulars to ensure that the parties are informed with reasonable particularity as to the matters which are alleged against them. The reason for this simple principle is this. That no party should be taken by surprise (Lim Kee Tiak v Lim Kee Tian [1987 2 MLJ 528; and Bangkok Bank Ltd v Prosperity Shipping & Trading (Pte) Ltd & Ors [1990] 1 MLJ 29). Another reason would be the desire to limit and define the issues at trial (Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd [1992] 2 MLJ 615) as well as to save time and expenses (Spedding v Fitzpartick (1888) 38 Ch D 410). All these would surely put the parties in a better position to prepare for trial (Thorp v Holdsworth (1876) 3 Ch D 637)."

[35] So, in essence this Court is allowing further and better particulars as follows:

(i) In relation to para 22 of the claim – to state that the cause of action is solely based on the said letter of appointment of 1.7.2019 in relation to without equivocation whether it is or it is not the Plaintiffs' case that their cause of action is based only on the letter of appointment dated 1.7.2019 to reduce the reduction of Contract Price from 8% to 3% ("Contract Price Issue") , and not on the Letter of Appointment dated .7.2019 for conversion of contract payment from "Provisional Quantity" to a "Lump Sum" contract ("Lump Sum Payment Issue");

(ii) To further state with particulars the facts as to how the First Defendant had mutually agreed with the Second Plaintiff that the mode of payment shall be the same as that of the

consultancy agreement between the First Defendant and BeCup Capital Sdn Bhd.

(iii) To state the particulars of the identity of the First Defendant's officer who is said to have liaised with the Second Plaintiff with regards to (2) above, ie. concerning the mutually agreed mode of payment was to be the same as the Consultancy Agreement between the First Defendant and BeCup Capital Sdn Bhd.

(iv) In relation to para 31 of the claim, to state with particulars whether the decision to reinstate the Project was limited to it or was applicable to other government projects.

Costs of RM7,000 is granted to the First to Third Defendants.

Striking out Application by the Fourth Defendant

[36] The Fourth Defendant had applied to strike out the suit against it based on the main contention that it was not a party to any purported consultancy agreement or letters of appointment. The Fourth Defendant contended that there was no privity of contract and that the Plaintiff's Statement of Claim had failed to disclose any reasonable cause of action against it.

The Plaintiffs' Claim

[37] The Plaintiff contended that after January 2018, the Fourth Defendant had decided to buy a 76% stake in the First Defendant and that the Fourth Defendant would execute the Project through the First Defendant. The Plaintiff contended that the current directors and

shareholders of the First Defendant are proxies or nominees and/or alter egos of the Fourth and Second and Third Defendants.

[38] Thereafter, it was the further contention of the Plaintiffs that a Mr Tan Choon Soon from the Fourth Defendant together with the Second and Third Defendants had discussed and engaged the Second Plaintiff through YAZ Consult Sdn Bhd for the First Defendant, to make representations against the termination and/or price reduction of the said Project.

[39] The Plaintiff contended that after succeeding in altering the reduction of the Contract Price for the Project, the Second and Third Defendants together with Mr Tan had instructed the Second Plaintiff to secure a change in the type of quantities for the Project or to further minimize the reduction of the Contract Price – the Plaintiffs pleaded the said appointment letters of 1.7.2019.

[40] When the Second Plaintiff could not get a response as to the consultancy payment from the Third Defendant, the Second Plaintiff met with Mr Tan at the Fourth Defendant's office on 31.3.2021.

The Fourth Defendant's Defence

[41] The parties to any consultancy agreement or letters of appointment involved the First Defendant which did not feature the Fourth Defendant. The Fourth Defendant, a legal corporate entity, was not a shareholder or director or management of the First Defendant. The shareholders and/or directors of the First Defendant were not proxies not nominees of the Fourth Defendant.

[42] There was neither any agreement or arrangement with the First Defendant for the Fourth Defendant to purchase any of its shares. The Fourth Defendant did not hold the purported 76% stake in the First Defendant. They are not related companies.

[43] The Fourth Defendant maintained that at all material times, it was one of the creditors of the First Defendant. It was not a subs-contractor of the First Defendant but one of the suppliers for the Project. The services rendered were labour supply, trucks and machinery rentals for the Project.

[44] The Fourth Defendant had not, in relation to the Project, appointed any of the Plaintiffs or any other parties as its consultant for the Project. Neither was it a contracting party with the Plaintiffs in any purported consultancy agreements or letters of appointment.

[45] The Fourth Defendant denied an involvement of its Mr Tan with the Plaintiffs.

This Court's assessment

[46] Based on all the pleadings, it is without a doubt that the Fourth Defendant was not a contracting party with the Plaintiff for the consultancy agreement nor the letters of appointment.

[47] The contention by the Plaintiffs that the Fourth Defendant had bought a 76% stake in the First Defendant amounted to just that – in the Statement of Claim, it was pleaded that the Second Plaintiff was informed by the Second and Third Defendants of the purported arrangement/agreement. As to the contention that the shareholders and/or directors of the First Defendant were proxies and nominees of the

Fourth Defendant, the pleadings stated that the Second Plaintiff was further informed so. In the absence of any other particularisation of facts pleaded, there does not disclose a reasonable cause of action against the Fourth Defendant by virtue of these contentions.

[48] Even if it is true, the contracting party was the First Defendant – which is a separate legal entity to the Fourth Defendant. The claim for consultancy fees was for the Project undertaken by the First Defendant. The Fourth Defendant had no direct contractual or business connection with the Plaintiffs. In fact, the Statement of Claim did not state the involvement of the Fourth Defendant or Mr Tan for procuring the Project. The Project was awarded to the First Defendant. The Fourth Defendant was not a party to the contract for the Project entered with the Government of Malaysia on 30.5.2018 for RM338,140,000.

[49] Mr Tan's involvement first featured in the Plaintiffs' Statement of Claim at para 18 where it was pleaded that the Second Plaintiff held discussions with the Second and Third Defendants. However, the Plaintiffs had not pleaded that Mr Tan was representing the Fourth Defendant (as opposed to just being a representative of the Fourth Defendant) and authorised by the Fourth Defendant to appoint the Second Plaintiff as a consultant for the Fourth Defendant. On the contrary, and as can be seen from the pleadings, the said discussions concerning the termination and/or contract price reduction for the Project awarded to the First Defendant. The appointment for the Second Plaintiff to undertake so through YAZ Consult Sdn Bhd was by the First Defendant, not the Fourth Defendant.

[50] Then at para 21 of the Statement of Claim, second para it stated:

"After succeeding in altering the reduction of the Contract Price from 10% to 8%, the 2nd Plaintiff was further instructed by the 2nd and 3rd Defendant and Mr Tan to secure a change in the type of quantities for the Project or to further minimize the reduction of the Contract Price."

[51] There was no prelude as to how Mr Tan came into the position of being able to have instructed the Second Defendant. Most importantly, the Plaintiffs did not plead that Mr Tan had done so for or on behalf of the Fourth Defendant.

[52] Mr Tan was mentioned lastly towards the end of the Statement of Claims where it was pleaded at para 37 that upon dissatisfied with the responses (or non-responses) from the Third Defendant for payments of the consultancy fee allegedly due, the Second Plaintiff had met with Mr Tan at the Fourth Defendant's office to discuss the same. However, the Plaintiffs had not pleaded how the Fourth Defendant came to be involved in the payment of consultancy fee when there were no agreements executed with the Fourth Defendant.

[53] Furthermore, it was also not pleaded that Mr Tan was discussing the same to settle debts owed by the Fourth Defendant, which was also not pleaded. A cursory mention that the Fourth Defendant was unjustly enriched at para 42 of the Statement of Claim without any other particulars did not make it a cause of action against the Fourth Defendant.

[54] This Court also concurred that there is nothing in the Plaintiff's pleadings that disclosed any material factual elements that concerned the Fourth Defendant regarding the existence of a trust for the Plaintiff or its

fiduciary duty to the Plaintiff nor any purported breaches by the Fourth Defendant against the Plaintiff.

[55] Order 18 Rule 19(1)(a) Rules of Court (RoC) gives this Court the power to strike out the claim against the Fourth Defendant if there is no reasonable cause of action disclosed. Here, there is want of privity of contract and locus standi. Even concerning the issue of constructive trust, it did not concern the Fourth Defendant. The Plaintiffs relied on the letter of appointment dated 1.7.2019 with the First Defendant to premise the contention of constructive trust. There is no involvement or obligation of the Fourth Defendant is pleaded or can be inferred. So, this Court does not find there to be an exception as ruled in ***Tropical Profile Sdn Bhd v Kerajaan Malaysia Jabatan Kerja Raya Malaysia & Ors [2007] 8 MLJ 419*** that held at para 27:

> "*As a general rule, a person who is not a contracting party does not have the contractual right to sue thereon since the law does not have the contractual right to sue thereon since the law does not recognize the rights of a third party who is a stranger to the contract. This Principle is known as the doctrine of privity of contract.*"

[56] This Court refers to the Federal Court's case of ***Suwiri Sdn Bhd v Government of the State of Sabah [2008] 1 MLJ 743*** at p750 held:
"*The doctrine of privity of contract is that as a general rule, a contract cannot confer rights or impose obligations on strangers to it, ie persons who are not parties to it.*"

[57] The Court of Appeal's decision in ***Tsang Yee Kwan v Majlis Perbandaran Batu Pahat [2011] 8 CLJ 913*** also bears guidance at para 27:

> "*It is trite law that only the parties to a contract incur rights and obligations under the contract. This is known as the privity rule. The second defendant as a third party to the SPA is not a party to the contract and has not provided consideration for the contract but the second defendant as a third party has an interest in the performance of the contract. It has been a long established rule that only the parties to a contract could incur rights and obligations under it. This is described as the doctrine of privity and by this principle it simply means that third parties could neither sue nor be sued under a contract.*"

[58] This Court finds that the suit against Fourth Defendant was wrongly instituted. Nothing in the Plaintiffs' Statement of Claim pleaded and disclosed any contractual duty or obligations or liabilities of the Fourth Defendant to the Plaintiffs.

[59] Furthermore, this Court observed that there are no remedies specifically pleaded against the Fourth Defendant. As similarly held in ***Chin Kok Woo & Ors (suing in their personal capacity and representing 19 resident unit buyers in the mixed development project known as 'Sky Park @ Cyberjaya') v Sky Park Properties Sdn Bhd & Ors [2022] 10 MLJ 153***, the absence of remedies pleaded seeking this Court's orders confirmed that the Plaintiff had no complete cause of action against the Fourth Defendant.

[60] The Fourth Defendant had submitted that the Plaintiff's own claim showed that the contract was premised on an illegal or immoral act – in other words that it was against public policy when the Second Defendant had purportedly used his purported influence or 'influence peddling' to secure the Project for the First Defendant. The Fourth Defendant thus urged this Court to strike out the claim on the ground that the claims are scandalous, frivolous or vexatious and/or is an abuse of Court process.

[61] This Court will not rule on this suggestion as it is already satisfied that on the ground of Order 18 Rule 19(1)(a) RoC, there is no reasonable cause of action disclosed against the Fourth Defendant and thus is struck out. It does not merit or warrant a full hearing.

[62] In deciding that the claim by the Plaintiffs against the Fourth Defendant is unsustainable and can be disposed of summarily, this Court is guided by the trite principles enunciated in ***Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36***. It was held:

> "*It is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable' (see AG of Duchy of Lancaster v L&NW Rly Co). It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence. (see Wenlock v Moloney & Ors). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for*

argument under O33 r3 (which is in pari materia with our O33 r2 of the RHC) (see Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable."

[63] This Court is satisfied that there is no reasonable cause of action by the Plaintiff against the Fourth Defendant. Reference is made to the decision in ***Government of Malaysia v Lim Kit Siang & Another Case [1988] 1 CLJ Rep 63*** at p67:

"What then is the meaning of 'a cause of action'? 'A cause of action' is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action. Lord Diplock in Lelang v Cooper [1965] 1 QB 232 at 242 defined 'a cause of action' to mean 'a factual situation, the existence of which entitles one person to obtain from the Court a remedy against another person'. In my view the factual situation spoken of by Lord Diplock must consist of a statement alleging that first the respondent/plaintiff has a right either at law or by statute and that secondly such right has been affected or prejudiced by the appellant/defendant's act."

[64] In concluding to allow the Fourth Defendant's application to strike out the Plaintiff's claim against it, a further reference is made to the decision in ***Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd [2011] 2 MLJ*** 192 at p200:

"The expression 'reasonable cause of action' means 'simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person'...The test to be applied is whether on the face of the pleadings, the court is prepared to say that the cause of action is obviously unsustainable.."

[65] Costs of RM15,000 is awarded to the Fourth Defendant

DATED 20 DECEMBER 2022

ROZ MAWAR ROZAIN
JUDICIAL COMMISSIONER
HIGH COURT OF MALAYA
KUALA LUMPUR

For the Plaintiff: *Harjit Singh Sandhu*

T/n Harjit Sandhu, Wan & Associates

For the 1st, 2nd & 3rd Defendant: *Martin Cho Cheng Tu*

T/n Shui Tai

For the 4th Defendant: *Tan Meng Tze together with Cheah Kit Yee*

T/n Tze & Yee